

Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

NEW FLYER INDUSTRIES CANADA ULC,  
and NEW FLYER OF AMERICA INC.,

Plaintiff,

v.

RUGBY AVIATION LLC d/b/a SAN JUAN  
AIRLINES,

Defendant.

CASE NO. 2:18-cv-00299-RSL

**AGREEMENT REGARDING  
DISCOVERY OF ELECTRONICALLY  
STORED INFORMATION AND  
~~PROPOSED~~ ORDER**

The parties hereby stipulate to the following provisions regarding the discovery of electronically stored information ("ESI") in this matter:

**A. General Principles**

1. An attorney's zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.

2. The proportionality standard set forth in Fed. R. Civ. P. 26(b)(1) must be applied in each case when formulating a discovery plan. To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as possible.

1 **B. ESI Disclosures**

2 Within 30 days after the Rule 26(f) conference, or at a later time if agreed to by the  
3 parties, each party shall disclose:

4 1. Custodians. The five custodians most likely to have discoverable ESI in their possession,  
5 custody or control. The custodians shall be identified by name, title, connection to the instant  
6 litigation, and the type of information under his/her control. Thereafter, the parties shall meet  
7 and confer to reach agreement on the identity of the custodians. The parties shall make good  
8 faith efforts to identify appropriate email custodians and produce discoverable ESI in their  
9 possession on the agreed upon schedule, but reserve the right to seek ESI from additional  
10 custodians identified through discovery.

11 2. Non-custodial Data Sources. A list of non-custodial data sources (e.g. shared drives,  
12 servers, etc.), if any, likely to contain discoverable ESI.

13 3. Third-Party Data Sources. A list of third-party data sources, if any, likely to  
14 contain discoverable ESI (e.g. third-party email and/or mobile device providers, "cloud"  
15 storage, etc.) and, for each such source, the extent to which a party is (or is not) able to  
16 preserve information stored in the third-party data source.

17 4. Inaccessible Data. A list of data sources, if any, likely to contain discoverable ESI  
18 (by type, date, custodian, electronic system or other criteria sufficient to specifically identify  
19 the data source) that a party asserts is not reasonably accessible under Fed. R. Civ. P.  
20 26(b)(2)(B).

21 **C. Preservation of ESI**

22 The parties acknowledge that they have a common law obligation to take reasonable and  
23 proportional steps to preserve discoverable information in the party's possession, custody, or  
24 control. With respect to preservation of ESI, the parties agree as follows:

25 1. Absent a showing of good cause by the requesting party, the parties shall not be  
26 required to modify the procedures used by them in the ordinary course of business to back-up

1 and archive data; provided, however, that the parties shall preserve all discoverable ESI in  
2 their possession, custody or control.

3 2. All parties shall supplement their disclosures in accordance with Rule 26(e) with  
4 discoverable ESI responsive to a particular discovery request or mandatory disclosure where  
5 that data is created after a disclosure or response is made (unless excluded under (C)(3) or  
6 (D)(1)-(2) below).

7 3. Absent a showing of good cause by the requesting party, the following categories of  
8 ESI need not be preserved:

- 9 a. Deleted, slack, fragmented, or other data only accessible by forensics.
- 10 b. Random access memory (RAM), temporary files, or other ephemeral data  
11 that are difficult to preserve without disabling the operating system.
- 12 c. On-line access data such as temporary internet files, history, cache, cookies, and  
13 the like.
- 14 d. Data in metadata fields that are frequently updated automatically, such as last-  
15 opened dates (see also Section (E)(5)).
- 16 e. Back-up data that are substantially duplicative of data that are more accessible  
17 elsewhere.
- 18 f. Server, system, or network logs.
- 19 g. Data remaining from systems no longer in use that is unintelligible on the systems  
20 in use.
- 21 h. Electronic data (e.g. email, calendars, contact data, and notes) sent to or from  
22 mobile devices (e.g., iPhone, iPad, Android, and Blackberry devices), provided  
23 that a copy of all such electronic data is routinely saved elsewhere (such as on a  
24 server, laptop, desktop computer, or "cloud" storage).

25 **D. Privilege**

26 1. With respect to privileged or work-product information generated after the filing of the  
complaint, parties are not required to include any such information in privilege logs.

2. Activities undertaken in compliance with the duty to preserve information are protected  
from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

3. Information produced in discovery that is protected as privileged or work product shall  
be immediately returned to the producing party, and its production shall not constitute a waiver

1 of such protection, if: (i) such information appears on its face to have been inadvertently  
2 produced or (ii) the producing party provides notice within 15 days of discovery by the  
3 producing party of the inadvertent production.

4 **E. ESI Discovery Procedures**

5 1. On-site inspection of electronic media. Such an inspection shall not be permitted absent  
6 a demonstration by the requesting party of specific need and good cause or by agreement of  
7 the parties.

8 2. Search methodology. The parties shall timely attempt to reach agreement on appropriate  
9 search terms, or an appropriate computer- or technology-aided methodology, before any such  
10 effort is undertaken. The parties shall continue to cooperate in revising the appropriateness of  
11 the search terms or computer- or technology-aided methodology. In the absence of agreement on  
12 appropriate search terms, or an appropriate computer- or technology-aided methodology, the  
13 following procedures shall apply:

14 a. A producing party shall disclose the search terms or queries, if any, and  
15 methodology that it proposes to use to locate ESI likely to contain discoverable information. The  
16 parties shall meet and confer to attempt to reach an agreement on the producing party's search  
17 terms and/or other methodology.

18 b. If search terms or queries are used to locate ESI likely to contain discoverable  
19 information, a requesting party is entitled to no more than 5 additional terms or queries to be  
20 used in connection with further electronic searches absent a showing of good cause or  
21 agreement of the parties. The 5 additional terms or queries, if any, must be provided by the  
22 requesting party within 14 days of receipt of the producing party's production.

23 c. Focused terms and queries should be employed; broad terms or queries, such as  
24 product and company names, generally should be avoided. Absent a showing of good cause,  
25 each search term or query returning more than 250 megabytes of data are presumed to be  
26 overbroad, excluding Microsoft PowerPoint files, image and audio files, and similarly large

1 file types.

2 d. The producing party shall search both non-custodial data sources and ESI  
3 maintained by the custodians identified above.

4 3. Format – documents in electronic format. Except as otherwise provided for in this  
5 Stipulation, all documents existing in electronic format shall be produced in multiple page,  
6 searchable PDF format at a resolution of at least 300 dpi in accordance with the following:

7 a. PDF files shall be produced along with Concordance/Opticon image load files  
8 that indicate the beginning and ending of each document.

9 b. For documents which already exist in PDF format prior to production (i.e., which  
10 the producing party receives from a client or third party in PDF format), the producing party  
11 may provide them in that same PDF format, whether searchable or non-searchable. For  
12 documents converted to PDF format prior to production, the producing party shall make  
13 reasonable efforts to convert to searchable PDF.

14 c. **Metadata.** Load files should include, where applicable and to the extent it exists,  
15 the following information: document type; custodian and duplicate custodians; author/from;  
16 recipient/to, cc and bcc; title/subject; file name and size; original file path; date and time  
17 created, sent, modified and/or received; and hash value. However, the parties are not obligated  
18 to include metadata for any document that does not contain such metadata in the original, if it is  
19 not possible to automate the creation of metadata when the document is collected. The parties  
20 reserve their rights to object to any request for the creation of metadata for documents that do  
21 not contain metadata in the original.

22 d. **Production media and encryption of productions.** Unless otherwise agreed,  
23 the parties shall provide document productions in the following manner: The producing party  
24 shall provide the production data on CDs, DVDs, external hard drives, or SFTP, as appropriate.  
25 The producing party shall encrypt the production data using WinRAR encryption, and the  
26 producing party shall forward the password to decrypt the production data separately from the

1 CD, DVD, external drive, or SFTP to which the production data is saved.

2 4. Format for production of documents – hardcopy or paper documents. All documents that  
3 are hardcopy or paper files shall be scanned and produced in the same manner as documents  
4 existing in electronic format, above.

5 5. De-duplication. The parties may de-duplicate their ESI production across custodial and  
6 non-custodial data sources after disclosure to the requesting party.

7 6. Native files. The parties will meet and confer to discuss requests for the production of  
8 files in native format, on a case-by-case basis. If the parties are unable to reach agreement with  
9 regard to requests for additional documents in native-file format, the parties reserve the right to  
10 seek relief from the Court. Documents produced natively shall be represented in the set of  
11 imaged documents by a slipsheet indicating the production identification number and  
12 confidentiality designation for the native file that is being produced.

13  
14 DATED: October 3, 2018

DATED: October 3, 2018

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13 **ORDER**

14 Based on the foregoing, IT IS SO ORDERED.

15 DATED:

16 Oct. 9, 2018

17 

18 The Honorable Robert S. Lasnik  
19 UNITED STATES DISTRICT JUDGE  
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1                   **ADDITIONAL PROVISIONS FOR MORE COMPLEX CASES**

2           In addition to the provisions set forth in the Model ESI Agreement above, parties may  
3 find the following provisions appropriate and useful in addressing more complicated ESI  
4 discovery issues. The complexity of ESI discovery varies from case to case and is not  
5 necessarily tied to the number or size of the parties or the amount in controversy. The  
6 additional provisions below are intended to assist parties in anticipating and addressing early  
7 on more complicated ESI discovery issues but may not be appropriate or necessary in every  
8 case. The following provisions are intended as suggested provisions from which parties may  
9 pick and choose, taking into consideration the needs of the particular case.

10           1.   Search methodology.

11           Upon reasonable request and if appropriate for the particular case, a party shall also  
12 disclose information relating to network design, the types of databases, database dictionaries,  
13 the access control list and security access logs and rights of individuals to access the system  
14 and specific files and applications, the ESI document retention policy, organizational chart for  
15 information systems personnel, or the backup and systems recovery routines, including, but  
16 not limited to, tape rotation and destruction/overwrite policy.

17           2.   Format.

18           a.   Each document image file shall be named with a unique Bates Number (e.g. the  
19 unique Bates Number of the page of the document in question, followed by its file extension).  
20 File names should not be more than twenty characters long or contain spaces. When a text-  
21 searchable image file is produced, the producing party must preserve the integrity of the  
22 underlying ESI, i.e., the original formatting, the metadata (as noted below) and, where  
23 applicable, the revision history. The parties shall produce their information in the following  
24 format: single- page images and associated multi-page text files containing extracted text or with  
25 appropriate software load files containing all requisite information for use with the document  
26 management system (e.g., Concordance® or Summation®), as agreed to by the parties.



1           b. If appropriate to the particular case, the parties shall consider whether or not the  
2 full text of each electronic document shall be extracted ("Extracted Text") and produced in a text  
3 file. If the parties so agree, the Extracted Text shall be provided in searchable ASCII text format  
4 (or Unicode text format if the text is in a foreign language) and shall be named with a unique  
5 Bates Number (e.g. the unique Bates Number of the first page of the corresponding production  
6 version of the document followed by its file extension).

7           c. If a document is more than one page, the unitization of the document and any  
8 attachments and/or affixed notes shall be maintained as they existed in the original document.

9           3. Metadata fields.

10           The parties are to confer and agree on whether metadata is to be produced or may be  
11 excluded from discovery. Metadata may not be relevant to the issues presented or, if relevant,  
12 may not be reasonably subject to discovery, or may be subject to cost-shifting, considering  
13 the factors set forth in Fed. R. Civ. P. 26(b)(2)(C). For example, if one party is producing only  
14 paper documents, and the other party is producing ESI, the parties should confer on whether  
15 the additional cost and burden of producing metadata by the party producing ESI is reasonable  
16 or should be shifted under the facts and circumstances of the case. If the parties agree to  
17 produce metadata, and unless otherwise agreed, each party shall produce the following  
18 metadata associated with ESI to the extent reasonably accessible: (a) the author(s) of the ESI;  
19 (b) the recipient(s) of the ESI; (c) the date the ESI was created; and (d) the source from which  
20 the ESI was produced. The "source" of ESI shall be the name of the person who was the  
21 custodian of the ESI or, if the name of a person is not available, the storage location (e.g.,  
22 "Regulatory Shared Drive-Wayne, PA"). This information will be included in the "Author,"  
23 "Recipient," "Date," and "Source" fields (respectively) for each document in the load file  
24 associated with the document images. Although it is presumed generally that the above list of  
25 metadata fields will be provided, the list of metadata fields is intended to be flexible and may  
26

1 be changed by agreement of the parties, particularly in light of advances and changes in  
2 technology, vendor and business practices.

3 4. Hard-Copy Documents.

4 If the parties elect to produce hard-copy documents in an electronic format, the  
5 production of hard-copy documents shall include a cross-reference file that indicates  
6 document breaks and sets forth the Custodian or Source associated with each produced  
7 document. Hard-copy documents shall be scanned using Optical Character Recognition  
8 technology and searchable ASCII text files shall be produced (or Unicode text format if the  
9 text is in a foreign language), unless the producing party can show that the cost would  
10 outweigh the usefulness of scanning (for example, when the condition of the paper is not  
11 conducive to scanning and will not result in accurate or reasonably useable/searchable ESI).  
12 Each file shall be named with a unique Bates Number (e.g. the Unique Bates Number of the  
13 first page of the corresponding production version of the document followed by its file  
14 extension).

15 5. Privilege Log Based on Metadata.

16 The parties agree that privilege logs shall be provided 30 days after the date agreed  
17 upon for final production in this matter. The privilege log shall include a unique identification  
18 number for each document and the basis for the claim (attorney-client privileged or work-  
19 product protection). For ESI, the privilege log may be generated using available metadata,  
20 including author/recipient or to/from/cc/bcc names; the subject matter or title and date created.  
21 Should the available metadata provide insufficient information for the purpose of evaluation  
22 the privilege claim asserted, the producing party shall include such additional information as  
23 required by the Federal Rules of Civil Procedure.